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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD WHITE, JR., Defendant and Appellant.	E034088 (Super.Ct.No. FWV024044) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Paul M. Bryant, Jr., Judge. Affirmed as modified.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., and Lilia E. Garcia, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant was charged in an amended information with the murder and robbery of Samuel Saenz, a Brinks security guard (Pen. Code, §§ 187, subd. (a) & 211;[1] counts 1 and 2) and the burglary of a Bank of America building (§ 459; count 3). It was further alleged that the murder was committed during the commission of the robbery and burglary (§ 190.2, subd. (a)(17)), that a principal was armed with a firearm in all counts (§ 12022, subd. (a)(1)), and that defendant had two prior strike convictions and two prison priors (§§ 667, subds. (b)-(i), 667.5 & 1170.12, subds. (a)-(d)).

The charges stemmed from a bank robbery at a Bank of America on October 30, 2000, in Ontario. Defendant acted as the getaway driver, and waited outside the bank while his confederate, Joe Abbott, entered the bank and fatally shot Saenz. Saenz had just walked out of the security vault and was pushing a cart with a large bank bag. Abbott picked up the bag, and he and defendant fled the scene with over $300,000 in cash and checks.

A jury found defendant guilty as charged, and found the special circumstances, armed enhancements, two prior strike convictions, and two prison priors true. Following a penalty trial, the jury determined that defendant should be sentenced to life without parole on count 1. Defendant was sentenced to life without parole on count 1, plus consecutive 25-year-to-life terms on counts 2 and 3, plus three 1-year terms for the armed

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

enhancements, plus two 1-year terms for the prison priors, for an aggregate sentence of life without parole plus 55 years to life.

Defendant appeals, raising three claims of instructional error and one claim of sentencing error. First, he contends that the trial court erroneously failed to sua sponte instruct the jury with CALJIC Nos. 6.18, 6.21, and 6.24, regarding the admission against him of Abbott's hearsay statements as testified to by various witnesses. Second, he contends that the trial court erroneously instructed the jury with the implied malice portion of CALJIC No. 8.11, and that, based on this instruction, the jury may have convicted him of first degree deliberate and premeditated murder, or first degree felony murder, based on implied malice. Third, he contends that the trial court erred in failing to sua sponte instruct the jury that, to convict him of felony murder, the murder of Saenz must have been in "furtherance of the common design of the robbery." Lastly, he contends that his sentences and enhancements on counts 2 and 3 must be stayed pursuant to section 654.

We conclude that defendant's claims of instructional error are either without merit or were harmless. We agree, however, that defendant's consecutive 25-year-to-life sentences and one-year armed enhancements on counts 2 and 3 must be stayed, and remand the matter to the trial court with directions to amend defendant's abstract of judgment accordingly.

FACTS AND PROCEDURAL HISTORY

A. *Prosecution Case*

Shortly after 10:00 a.m. on October 30, 2000, Saenz, a Brinks armored car guard, arrived at the Bank of America in Ontario. Saenz and two bank employees entered the security vault to exchange currency and deposits. Saenz then exited the vault, pushing a cart with a large bank bag containing cash and other bank notes.

Abbot, an African-American disguised as an elderly white man,[2] quickly walked up to Saenz from behind and shot him several times in the back of the head. Saenz fell to the floor. Abbott grabbed the bank bag and started to leave. When Saenz moved, Abbott shot him "execution style" in the left temple.[3] Abbott then ran out of the bank with the bank bag, which contained over $300,000 in cash and checks.[4]

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[2] On October 29, Abbott met with a "special effects" or makeup artist, and asked to be made to look like a "white guy." The artist applied white makeup, added a bald cap, and added nose, cheek, and brow pieces. Abbott told the artist he was going to wear the disguise to work the next day. Witnesses at the bank noticed that the shooter was wearing makeup, and that the back of his neck was darker than his face.

[3] Saenz died as a result of the gunshot wound to his temple. He was shot a total of four times. The other three wounds were superficial.

[4] A later audit revealed that $337,243.89 in cash and checks was missing from the bank.

Another man, whom various witnesses described as Hispanic, dark-skinned, and African–American,[5] was waiting outside the bank in a blue-green Honda. Abbott got into the Honda, and he and the driver fled. One witness was certain that the driver and Abbott were laughing as they drove away. The blue-green Honda was found three to four blocks from the bank. It had been stolen in August 2000.

On October 31, 2000, the day after the robbery, a Los Angeles County Sheriff's deputy recovered the bank bag from a Best Western Motel in Rowland Heights. A motel maintenance employee found the bag, which contained checks, in a trash can, and the police were called. The front desk clerk identified Abbott as a hotel guest who pulled out a wad of money to pay his bill. Abbott's fingerprints were found on items in the trash can. The fingerprints and a footprint of Frewoini Berhane, Abbott's girlfriend, were also found on items in the trash can.

Further investigation revealed that Lenard "Sunny" Wilkes was also involved in the robbery. Wilkes testified for the prosecution.[6] Wilkes said that he, Abbott, and defendant had been friends for about 15 years. In October 2000, Wilkes drove Abbott to certain locations in Ontario, including the Bank of America and two nearby residential

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[5] Defendant is African-American.

[6] Wilkes was charged with murder, robbery, and burglary. He pleaded guilty to voluntary manslaughter, robbery, and being an accomplice armed with a firearm, and agreed to testify truthfully.

locations. Abbott was showing Wilkes where he was to park and wait for Abbott before and after the robbery. Wilkes knew Abbott was planning a robbery. Wilkes asked Abbott whether anyone else was involved, and Abbott told him defendant would be participating. Abbott also said that a girl named Brenda was supposed to take a bag and get rid of it for him.

On October 30, 2000, shortly after 8:00 a.m., Wilkes met Abbott and defendant at one of the prearranged residential locations. Wilkes was waiting in a parked car. Abbott and defendant drove up in a gold car. Defendant was driving.[7] Abbott got into a green car that was parked at the location. Defendant stayed in the gold car. In separate cars, the three men proceeded to another location a few blocks from the bank. Abbott led the way; defendant and Wilkes followed. At the new location, Wilkes parked his car. Defendant got out of the gold car and got into the green car with Abbott. Defendant and Abbott then left while Wilkes waited for them in his car.

About an hour later, defendant and Abbott returned in the green car. Defendant was driving and Abbott was in the passenger seat. They both got out of the green car. Abbott tossed two bags into Wilkes's car, and got into the gold car that defendant had

[7] Defendant's sister, Janice White, told police that she loaned defendant her tan-colored 1997 Toyota Corolla on October 29, and that defendant returned the car to her late in the evening of October 30.

parked there.[8] The men then drove to a home in Ontario where Berhane's siblings lived. Defendant left. Abbott took the bags from Wilkes's car into the house. There, Abbott tore up plastic bags that contained money and deposit slips, and put the money into a dark-colored trash bag. Abbott gave Wilkes a trash bag full of stuff and told him to get rid of it. Wilkes then left the house. The next day, October 31, Wilkes met Abbot at a Best Western motel where Abbott gave him $5,000.

Berhane also testified for the prosecution.[9] She said that Abbott had directed her to rent the motel room, and that he arrived there around noon on October 30, 2000, with a plastic trash bag. Inside the room, he was pulling money out of the bag. She asked him where the money came from. He told her she did not need to know. Berhane also testified that, later that evening, defendant arrived at the motel room. Defendant and Abbott left the room after about five minutes. Defendant did not return. Abbott returned after an hour or two.

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[8] Wilkes's testimony was corroborated by various nonaccomplice witnesses who saw Wilkes's car, the gold car, and the blue-green Honda in the residential areas near the bank, and a man who matched Abbott's description.

[9] Berhane was charged with murder, robbery, burglary, and being an accessory. She pled guilty to being an accessory and agreed to testify truthfully.

Brenda Maza also assisted with the robbery and testified for the prosecution.[10] In late September 2000, Abbott told Maza he wanted her to help him rob the Bank of America, and that he wanted to be made up to look like a different person for the robbery. A few weeks before the robbery, Maza told Abbott about the artist who made up Abbott's face on October 29. Abbott told Maza how he was going to rob the bank. He said he would be able to enter the bank unnoticed, and was going to "dome" the guard, meaning he was going to kill him.

Abbott drove Maza to the Bank of America and the locations near the bank where Abbott, Wilkes, and defendant met both before and after the robbery. Abbott told Maza he wanted her to park her car on a street in the surrounding neighborhood and wait for him. He promised her $10,000. On the morning of October 30, Abbott called Maza and asked her to help him go to the bank. Maza said no. But after the robbery, Maza took Abbott to hotels where he was hiding, purchased a safe for him, and rented a storage facility for him using someone else's name. Abbott gave Maza $2,000.

On November 15, 2000, Abbott turned himself in. By this time, the media was reporting that the police were looking for defendant. Maza was driving defendant places so the police could not find him.

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[10] Maza was charged and pled guilty to being an accessory to murder. She also agreed to testify truthfully.

In mid-November 2000, defendant called Los Angeles County Deputy Sheriff Theresa Culberson, asking for her assistance in turning himself in. Culberson and defendant grew up in the same neighborhood and had known each other for years. Defendant told Culberson he was not involved in the crimes. He gave her the name and phone number of a woman he said he was with at the time of the crimes. He also said something to the effect that Wilkes, who was in custody, was the only person who could implicate him in the crimes. He said a Caucasian girl was helping him get around so the police could not find him.

On November 21, 2000, Culberson met defendant at a barbershop in West Covina. After Culberson left, the police arrested defendant at the shop. After waiving his *Miranda*[11] rights, defendant was interviewed and denied knowing anything about the robbery or murder. At the time of his arrest, he had a black bag containing $2,481 in $20 bills. He also had a diamond ring in a box, and a receipt showing he had purchased it for $1,062.17. The clerk who sold him the ring testified that he paid for the ring with $20 bills.

Abbott's phone records showed 17 calls placed to defendant's cell phone or pager on October 29, 30, and 31. Seven of these calls were made on October 30. These totaled over 10 minutes and ranged from about 20 to 90 seconds. Two calls were made from defendant's residence to Abbott's phone at 6:55 a.m. on October 30. These calls were

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[11] *Miranda v. Arizona* (1966) 384 U.S. 436.

about 25 and 90 seconds. At trial, defendant testified he could not recall what he and Abbott were talking about.

B. *Defense Case*

Defendant relied on a defense of alibi. June Glaze testified that defendant was at her residence at the time of the crimes on October 30, 2000, and that Angela Brown was also present. Angela Brown gave consistent testimony.

Defendant also testified that he was with Glaze and Brown at the time of the crimes. But he admitted he did not tell the police about his alibi when he was interviewed shortly after his arrest. He also denied driving his sister's tan car on October 30.

C. *Rebuttal Case*

Police spoke to Glaze and Brown in November 2000. Glaze did not say defendant was with her on October 30. Angela Brown gave police a false name, and also did not say she was with defendant on October 30.

DISCUSSION

A. *The Trial Court Erroneously Failed to Give CALJIC Nos. 6.18, 6.24, and 2.50.02, But the Error Was Harmless*

After the close of the evidence, the People requested, and the trial court gave, CALJIC No. 6.10.5 (Conspiracy and Overt Act—Defined—Not Pleaded as Crime

Charged).[12] The prosecutor said that "there were statements made by Mr. Abbott that came through other witnesses. Those were statements made in furtherance of the conspiracy; that's the only exception to them, to get over the double hearsay hurdle."

Defense counsel responded, "I don't care. My initial objection to it was there wasn't an objection to that when the testimony was brought in; I deemed it was going to come in. I think then to add a conspiracy instruction with all this other [*sic*] is only confusing to the jury. If it is required, then we are stuck with it." Defense counsel did not request any additional conspiracy instructions.

Defendant now contends the trial court had a duty to give, and the prosecutor had a duty to request, three additional conspiracy instructions. These are: CALJIC Nos. 6.18 (Commission of Act in Furtherance of a Conspiracy Does Not Itself Prove Membership

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[12] As given, CALJIC No. 6.10.5 read: "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of Murder, Robbery or Commercial Burglary, and with the further specific intent to commit such crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case. [¶] In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged act was committed. [¶] The term 'overt act' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy. [¶] To be an 'overt act,' the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or unlawful act."

in Conspiracy),[13] 6.21 (Liability for Acts Committed After Termination of Conspiracy),[14] and 6.24 (Determination of Admissibility of Co-conspirator's Statements).[15] Defendant argues that these instructions were necessary to fully explain the applicable law of conspiracy.

We agree with defendant that, on the facts of this case, the trial court had a duty to sua sponte give CALJIC Nos. 6.18, 6.21, and 6.24, in addition to CALJIC No. 6.10.5. We also conclude that the trial court had a duty to give CALJIC No. 2.50.02, which defines "preponderance of the evidence"[16] as that term is used in CALJIC No. 6.24.

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[13] CALJIC No. 6.18 states: "Evidence of the commission of an act which furthered the purpose of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of the alleged conspiracy."

[14] CALJIC No. 6.21 states: "No act or declaration of a conspirator committed or made after the conspiracy has been terminated is binding upon co-conspirators, and they are not criminally liable for that act."

[15] CALJIC No. 6.24 states: "Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine by a preponderance of the evidence: [¶] 1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed; [¶] 2. That the statement was made while the person making the statement was participating in the conspiracy and that the person against whom it was offered was participating in the conspiracy before or during that time; and [¶] 3. That the statement was made in furtherance of the objective of the conspiracy. [¶] The word 'statement' as used in this instruction includes any oral or written verbal expression or the nonverbal conduct of a person intended by that person as a substitute for oral or written verbal expression."

[16] CALJIC No. 2.50.02 states: "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly

[footnote continued on next page]

CALJIC Nos. 2.50.02, 6.18, and 6.24 were necessary to explain the foundational facts the prosecution had to prove, by a preponderance of the evidence, before the jury could consider Abbott's hearsay statements as evidence against defendant, as testified to by Wilkes and other witnesses. CALJIC No. 6.21 was also necessary to fully explain the applicable law of conspiracy.

In criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. These are the principles which are "'closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled in part on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149, and disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; §§ 1093, subd. (f) & 1127.)

A hearsay "statement"[17] of a party's coconspirator is admissible against the party pursuant to Evidence Code section 1223. The theory of this exception to the hearsay rule is that coconspirators authorize each other to do and say everything in furtherance of the

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[footnote continued from previous page]
balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it."

[17] "Statement" means "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.)

conspiracy. (1 Jefferson Cal. Evidence Benchbook (Cont.Ed.Bar. 3d ed. 2004) Admissions and Confessions, § 3.40, pp. 97-98.) The exception is similar to the exception for authorized admissions. (*Ibid.*; Evid. Code, § 1222.)

In a criminal case, Evidence Code section 1223 does not apply, and the jury may not consider an alleged coconspirator's hearsay statement against the defendant, unless the prosecution proves four foundational facts by a preponderance of the evidence. These are: (1) the existence of a conspiracy between the defendant and the declarant; (2) the declarant was participating in the conspiracy at the time the statement was made; (3) the defendant was participating in the conspiracy either prior to or during the time the statement was made; and (4) the statement was made in furtherance of the objective of the conspiracy. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 58-66.) The existence of the conspiracy must be established by evidence independent of the proffered hearsay statements. (*Id*. at pp. 64-65; Evid. Code, § 1223, subd. (c); *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10; *People v. Hardy* (1992) 2 Cal.4th 86, 139.)

Evidence Code section 1223's foundational requirements are reflected in CALJIC Nos. 6.24 and 6.18. The term "conspiracy" is defined in CALJIC No. 6.10.5 and the term "preponderance of the evidence" is defined in CALJIC No. 2.50.02. Further, CALJIC No. 6.21 admonishes the jury that hearsay statements made after the termination of the conspiracy are not binding on the defendant. Together, these instructions reflected legal principles that were closely and openly connected with the facts of this particular case,

and which were necessary for the jury's understanding of the case. (*People v. Sedeno, supra,* 10 Cal.3d at p. 715.)[18]

Nevertheless, it is not reasonably probable the jury would have reached a different result had the additional instructions been given. (*People v. Prieto, supra,* 30 Cal.4th at p. 251.) Indeed, the failure to give the additional conspiracy instructions was harmless beyond a reasonable doubt. Evidence independent of any of Abbott's hearsay statements, particularly Wilkes's percipient, corroborated testimony, overwhelmingly established that defendant participated in a conspiracy with Abbott and Wilkes to rob the Bank of America. Additionally, the overwhelming majority of Abbott's hearsay statements as testified to by Wilkes and other witnesses were made or occurred while Abbott and defendant were participating in the conspiracy, and were in furtherance of the objective of the conspiracy. Thus, even if the additional conspiracy instructions had been given, there is no reasonable possibility the jury would have reached a different result.

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[18] Our state Supreme Court has not decided whether or to what extent conspiracy instructions must be given sua sponte where, as here, an alleged coconspirator's hearsay statement is proffered against a defendant. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 251; *People v. Sully* (1991) 53 Cal.3d 1195, 1231.) In one case, however, an appellate court held that the trial court had a duty to define conspiracy (i.e., give CALJIC No. 6.10.5) where CALJIC No. 6.24 was given and an alleged coconspirator's hearsay statements were proffered against the defendant. (*People v. Earnest* (1975) 53 Cal.App.3d 734, 744-745.)

B. *The Implied Malice Portion of CALJIC No. 8.21, Even if Erroneously Given, Was Harmless*

The trial court instructed the jury on first degree murder, specifically, deliberate and premeditated murder (CALJIC No. 8.20)[19] and felony murder (CALJIC No. 8.21).[20] Pursuant to defense counsel's request, the trial court did not give any instructions on

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[19] CALJIC No. 8.20 (Deliberate and Premeditated Murder) read: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing *with express malice aforethought* is murder of the first degree. [¶] The word 'willful,' as used in this instruction, means intentional. [¶] The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand. [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [¶] The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill." (Italics added.)

[20] As given, CALJIC No. 8.21 (First Degree Felony-Murder) read: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of the crime or as a direct result of Robbery or Burglary is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit Robbery or Commercial Burglary and the commission of such crime must be proved beyond a reasonable doubt."

second degree murder. (E.g., CALJIC Nos. 8.30 & 8.31.) The trial court also gave CALJIC No. 8.10,[21] defining murder as requiring malice aforethought, and CALJIC No. 8.11,[22] defining both express and implied malice. Defense counsel did not object to giving CALJIC No. 8.11.

Here, however, defendant contends the trial court prejudicially erred in giving the implied malice portion of CALJIC No. 8.11. He argues that, because implied malice supports only second degree murder, not first degree murder, and because no second degree murder instructions were given, the jury may have unlawfully convicted him of first degree murder based on a finding of implied malice.

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[21] CALJIC No. 8.10 read, in pertinent part: "Defendant is accused in Count 1 of having committed the crime of murder, a violation of Penal Code section 187. [¶] Every person who unlawfully kills a human being with malice aforethought or during the commission of a Robbery or Burglary a felony inherently dangerous to human life is guilty of the crime of murder in violation of section 187 of the Penal Code."

[22] CALJIC No. 8.11 stated: "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. Malice is implied when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

We disagree. We find that giving the implied malice portion of CALJIC No. 8.11, even if erroneous, was not prejudicial. Based on the instructions as a whole, including CALJIC Nos. 8.20 and 8.21, the jury must have understood that it could not convict defendant of either form of first degree murder -- deliberate and premeditated murder or felony murder -- based on implied malice. Thus, the implied malice instruction could not have confused the jury or affected its verdict.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129, citing *People v. Eggers* (1947) 30 Cal.2d 676, 687.) But, "[j]ury instructions must be read together and understood in context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court. [Citations.]" (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.) "An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury. [Citations.]" (*Id.* at pp. 10-11.)

As noted, the jury was given CALJIC No. 8.10, which told them that murder requires malice aforethought, and CALJIC No. 8.11, defining express and implied malice. Next, the jury was given CALJIC No. 8.20, which told them that first degree deliberate and premeditated murder requires *express malice aforethought*. Further, CALJIC No. 8.21, the first degree felony-murder instruction, did not require either

express or implied malice, but a specific intent to commit a robbery or commercial burglary.[23]

In this context, the implied malice portion of CALJIC No. 8.11 served the useful purpose of distinguishing between express and implied malice for purposes of CALJIC No. 8.20, the first degree deliberate and premeditated murder instruction. Additionally, in view of the specific requirements of CALJIC Nos. 8.20 and 8.21, the jury must have understood that it could not find defendant guilty of either form of first degree murder based on implied malice. Thus, even if the implied malice portion of CALJIC No. 8.11 was erroneously given, because it was inapplicable to the facts of the case, it could not have misled the jury or affected its verdict in any way.

Defendant's reliance on *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 666-670, is misplaced. There, the jury was instructed that it could convict the defendant of murder based on malice, or felony murder based on the theory that a death occurred during the commission of an assault with a deadly weapon. The latter instruction was erroneous, the court held, because, in California, felony murder cannot be predicated on an assault with

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[23] The jury was also instructed on the definitions of principals and aiders and abettors (CALJIC Nos. 3.00 & 3.01) and on the liability of a principal for the natural and probable consequences of the actions of a coprincipal (CALJIC No. 3.02). CALJIC No. 3.02 specifically told the jury that it could not find defendant guilty of murder, robbery, and commercial burglary unless it was satisfied beyond a reasonable doubt that (1) the crime or crimes of murder, robbery, and commercial burglary were committed, (2) defendant aided and abetted the crimes, (3) a coprincipal committed the crimes, and (4) the crime of murder was a natural and probable consequence of the crimes of robbery and commercial burglary.

a deadly weapon. (*Id*. at pp. 666-667.) The court further held that defendant was denied a fair trial, because the jury may have convicted him based on the erroneous felony-murder instruction. (*Id*. at pp. 669-670.)

Here, however, the jury was not given an erroneous theory upon which to convict defendant. Rather, the jury was properly instructed on both first degree deliberate and premeditated murder and first degree felony murder. And in view of these instructions, the jury could not have convicted defendant of either form of first degree murder based on implied malice.

C. *The Trial Court Did Not Have a Duty to Sua Sponte Instruct the Jury That It Could Not Convict Defendant of First Degree Felony Murder Unless the Killing Was Committed "in Furtherance of the Common Design of the Robbery"*

Defendant contends that because he was not the shooter and there was no evidence he was armed, the trial court erred in failing to sua sponte instruct the jury that it could not convict him of first degree felony murder unless the killing occurred "*in furtherance of the common design* of the robbery." (Italics added, capitalization omitted.) We disagree.

Felony murder is statutorily defined as "murder . . . committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including robbery and burglary]." (§ 189.) "The mental state required is simply the specific intent to commit the underlying felony [citation] . . . . [¶] The purpose of the felony-murder rule is to

deter those who commit the enumerated felonies from killing by holding them *strictly responsible* for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. [Citation.]" (*People v. Cavitt* (2004) 33 Cal.4th 187, 197 (*Cavitt*), italics added.)

Our state Supreme Court has specifically held that the felony-murder rule does *not* require proof that the act resulting in death *furthered or facilitated* the underlying felony. (*Cavitt, supra,* 33 Cal.4th at p. 203.) Instead, the felony-murder rule requires proof of a *causal* and a *temporal* relationship between the underlying felony and the act resulting in death. (*Id*. at p. 193.) "The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.*)

Here, the jury was instructed with CALJIC No. 8.27 (First Degree Felony-Murder Aider and Abettor). It provided, in pertinent part: "If a human being is killed by any one of several persons *engaged in the commission* of the crime of Robbery or Commercial Burglary, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are

guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." (Italics added.)

The majority opinion in *Cavitt* held that the foregoing portion of CALJIC No. 8.27 "adequately apprised" the jury of both the causal and temporal relationship requirements of the felony-murder rule. (*Cavitt, supra,* 33 Cal.4th at p. 203.) Justice Werdegar, in a concurring opinion signed by Justice Kennard, disagreed, reasoning that the instruction did not adequately apprise the jury of the causal connection or logical nexus requirement, but finding the error harmless. (*Id*. at pp. 210-212.) In a separate concurring opinion, Justice Chin reasoned that the instruction was adequate, but urged courts in future cases to more clearly explain both the causal and temporal relationship requirements. (*Id*. at p. 213.)

Regardless of whether CALJIC No. 8.27 clearly states the causal and temporal relationship requirements, here, as in *Cavitt*, the trial court did not have a sua sponte duty to clarify either requirement. (*Cavitt, supra,* 33 Cal.4th at pp. 203-204 [no sua sponte duty to give clarifying instruction on causal relationship requirement where evidence raised no issue whether requirement satisfied].) Here, as in *Cavitt*, the evidence did not raise an issue regarding whether either the causal or temporal relationship requirements were satisfied. (*Ibid*.) Indeed, the evidence unequivocally showed that the robbery and burglary of the Bank of America, and Abbott's homicidal act of shooting the Brinks guard, Samuel Saenz, in the temple, were both causally and temporally related. It is of no

moment whether, as defendant argues, the murder of Saenz was not in furtherance of and was "completely unnecessary" to the robbery.

D. *Defendant's Sentences and Enhancements on Counts 2 and 3 Must Be Stayed*

Defendant contends that his sentences and enhancements on counts 2 and 3 -- two consecutive 25-year-to-life sentences and two 1-year armed enhancements -- must be stayed pursuant to section 654, because the murder, robbery, and burglary were incident to a single objective. The People contend that section 654 does not apply, because defendant's consecutive sentences on counts 2 and 3 were imposed pursuant to the "Three Strikes" law. (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)(7), (c)(2)(A)(ii).) We agree with defendant.

The Three Strikes law provides: "Notwithstanding any other law. . . ." [¶] . . . [¶]

"(6) If there is a current conviction for more than one felony count *not committed on the same occasion, and not arising from the same set of operative facts*, the court shall sentence the defendant consecutively on each count . . . .

"(7) If there is a current conviction for more than one serious or violent felony *as described in paragraph (6)* [*of this subdivision*,[24]] the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the

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[24] The phrase "as described in paragraph (6) [of this subdivision]" means "not committed on the same occasion, and not arising from the same set of operative facts." (*People v. Hendrix* (1997) 16 Cal.4th 508, 513.)

defendant may be consecutively sentenced in the manner prescribed by law." (§§ 667, subd. (c) & 1170.12, subd. (a), italics added.)

"Accordingly, if two [or more] current felonies either *were* committed on the same occasion or *do* arise from the same set of operative facts, the [T]hree [S]trikes law does not mandate consecutive sentencing; the trial court retains discretion to sentence either concurrently or consecutively." (*People v. Danowski* (1999) 74 Cal.App.4th 815, 821, citing *People v. Hendrix, supra,* 16 Cal.4th at pp. 513-514.) And, "[w]here the 'same occasion/same operative facts' test *is* satisfied . . . the [T]hree [S]trikes law does not [] mandate that the trial court 'shall' do anything. In such a case, there is no 'notwithstanding any other law' provision to override section 654. Section 654 applies of its own force." (*People v. Danowski, supra,* at p. 823.)

Here, the murder of Saenz and the robbery and burglary of the bank were clearly committed on the same occasion. Accordingly, the Three Strikes law did not mandate the imposition of consecutive terms on counts 2 and 3, and section 654 applies. Section 654 prohibits multiple punishment when a defendant's course of conduct results in multiple convictions "[i]f all of the offenses were incident to one objective . . . ." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) And, "[a]lthough the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Here, there was no evidence that defendant harbored more than a single objective in aiding and abetting the robbery and murder of Saenz and the burglary of the bank: all crimes were incident to the single objective of robbing Saenz. Moreover, a defendant may not be punished for first degree murder and for a felony conviction which renders the killing first degree or felony murder. (*People v. Meredith* (1981) 29 Cal.3d 682, 695-696 [robbery sentence stayed where defendant also sentenced for first degree murder of robbery victim]; *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 708-709; *People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576 ; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 769-770 (conc. opn. of Chin, J.) [commenting on lack of necessity of courts, prosecutors, and defense attorneys expending energy and resources dealing with lesser sentencing issues when defendant sentenced to death or life without parole].)

Accordingly, we order defendant's 25-year-to-life sentences on counts 2 and 3 stayed pursuant to section 654. Defendant's one-year armed enhancements on counts 2 and 3 must also be stayed. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310-1311.)

DISPOSITION

Defendant's sentences and armed enhancements on counts 2 and 3 are stayed. In all other respects, the judgment is affirmed. The trial court is directed to amend

defendant's abstract of judgment to reflect these modifications and to forward a certified copy of the amended abstract to the Department of Corrections. (§§ 1213 & 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.